

NO. **82 5020**

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

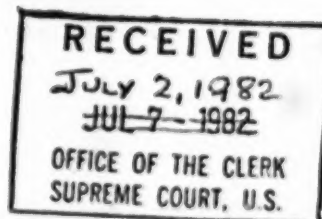
AUBREY DENNIS ADAMS, JR.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

QUESTION

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THE FLORIDA SUPREME COURT, IN AFFIRMING PETITIONER'S DEATH SENTENCE, APPLIED AN UNCONSTITUTIONALLY BROAD AND VAGUE CONSTRUCTION OF THE PROVISION OF ITS DEATH PENALTY STATUTE ESTABLISHING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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STATES OF THE CASE

Defendant was convicted of first degree murder, and on January 18, 1975 was sentenced to death. The trial court found three statutory aggravating circumstances and one mitigating circumstance. The Supreme Court of Florida, on February 11, 1975, affirmed the conviction and death sentence. *Allen v. State*, 312 So.2d 250 (Fla. 1975) [Appendix A]. The Court found that there was sufficient competent evidence to support the trial court's finding of a third aggravating circumstance and to support the death sentence as to each of the three aggravating circumstances. The Court reversed in the opinion of the Court. Justice Boyd dissented as to imposition of the death. - iv - and would have ordered a reduction in the sentence to life imprisonment without eligibility

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is Adams v. State, 412 So.2d 850 (Fla. 1982). and is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered February 11, 1982, and petitioner's timely motion for rehearing was denied on May 5, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix C. This case involves the Eighth Amendment to the United States Constitution [prohibition against cruel and unusual punishments, made applicable to the States through the Fourteenth Amendment, see Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)], and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder, and on January 16, 1979 was sentenced to death. The trial court found three statutory aggravating circumstances and three mitigating circumstances. The Supreme Court of Florida, on February 11, 1982, affirmed the conviction and death sentence. Adams v. State, 412 So.2d 850 (Fla. 1982) [Appendix A]. The Court found that there was sufficient competent evidence to support the trial court's finding as to each of the three aggravating circumstances. Four justices concurred in the opinion of the Court. Justice Boyd dissented as to imposition of the death penalty, and would have ordered a reduction in the sentence to life imprisonment without eligibility

for parole for 25 years. Justice McDonald also dissented as to penalty. [Under Florida law, a death sentence cannot be carried out unless at least four members of the Supreme Court agree that it is warranted, notwithstanding the jury's recommendation, and the trial court's imposition, of the death sentence. Vasil v. State, 374 So.2d 465, 471 (Fla. 1979).] Petitioner's timely motion for rehearing was denied on May 5, 1982.

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

In his brief on appeal, petitioner contended that imposition of the death penalty on the basis of unproven aggravating circumstances violated the Eighth and Fourteenth Amendments [Appendix E-2, 4-5]. Petitioner challenged, inter alia, the trial court's finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest [Appendix E-6-9]. He argued that this finding was unsupported by the evidence, and inconsistent with Florida case law defining this aggravating circumstance [Appendix E-7-8]. Petitioner pointed out that the trial court's finding was based on a circumstance [discovery of the victim's body seven weeks after her disappearance] which might tend to indicate a motive for covering up the murder, but would not shed any light on the motive for committing it [Appendix E-8-9]. It was suggested that if the trial court's reasoning were upheld, it would result in the type of mechanical application of the death penalty statute that would render it unconstitutional in application, if not on its face [Appendix E-9].

The Florida Supreme Court rejected petitioner's argument on this point as follows:

Defendant next argues that the trial judge erred in finding that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. §921.141(5)(e), Fla. Stat. The trial judge made the following finding of fact:

That the capital felony was committed for the purpose of avoiding or preventing

a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

The record shows that the victim knew and could have identified defendant; that he encased the body white plastic garbage bags and tied it with a rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

In *Riley v. State*, 366 So.2d 17 (Fla. 1978), the robbery victim, who knew and could identify the defendant, had been bound and gagged. He was then shot in the head after one of the perpetrators expressed a concern for subsequent identification. This Court concluded that the aggravating circumstance existed because the defendant had killed the victim to avoid identification and arrest. See also *Hoy v. State*, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jackson v. State*, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 117, 62 L.Ed.2d 115 (1979).

There was sufficient competent evidence in the record from which the judge could find that the defendant committed this capital felony in an effort to avoid or prevent a lawful arrest.

Adams v. State, supra, at 756 [Appendix A-7]

Petitioner's motion for rehearing was directed solely to the issue concerning the finding that the murder was committed for the purpose of avoiding arrest [Appendix B-1-6]. Petitioner pointed out that the Florida Supreme Court had construed the aggravating circumstance dealing with murders committed in order to avoid arrest (at least where the victim is not a law enforcement officer) to require a clear showing that the dominant or only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) [Appendix B-2-3]. It was argued

that in the present case there was no evidence of the motivation (if any) for the murder, and that the finding of the aggravating circumstance based on sheer speculation (i.e. "what other motive could there have been?", see Appendix B-4-5, F-2-3) violated the Eighth and Fourteenth Amendments to the United States Constitution. See e.g. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 44 L. Ed.2d 398 (1980); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) [Appendix B-5-6]. The motion for rehearing was denied without opinion on May 5, 1982 [Appendix B-8].

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 44 L.Ed.2d 398 (1980) This Court found that the State of Georgia had argued that a broad and vague construction of the provision of its death penalty statute establishing as an aggravating circumstance that the offense was committed with a motive of hate, hostility or revenge is that it involved torture, depravity of mind, or an aggravated battery to the victim. As to violate the Eighth and Fourteenth Amendments to the United States Constitution.

In the present case, the finding of the aggravating circumstance, the Supreme Court of Florida has argued as merely broad and vague construction of a provision of its death penalty statute. Without such designation, a premeditated murder may be found to have been committed for the purpose of avoiding arrest, without any evidence of such a motive, simply on the basis that the trial or appellate court cannot discern any other logical reason for the murder.

Florida's death penalty statute provides that one of the aggravating circumstances to be considered in determining whether a death sentence should be imposed is that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The State will not prevail unless it can show that the victim was not a law enforcement officer or a clear showing that the defendant or only motive for the

REASONS FOR GRANTING WRIT

QUESTION PRESENTED

QUESTION

THE FLORIDA SUPREME COURT, IN AFFIRMING PETITIONER'S DEATH SENTENCE, APPLIED AN UNCONSTITUTIONALLY BROAD AND VAGUE CONSTRUCTION OF THE PROVISION OF ITS DEATH PENALTY STATUTE ESTABLISHING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) this Court found that the State of Georgia had adopted such a broad and vague construction of the provision of its death penalty statute establishing as an aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim", as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

In the present case, in affirming the imposition of the death penalty, the Supreme Court of Florida has adopted an equally broad and vague construction of a provision of its death penalty statute. Without much exaggeration, a premeditated murder may now be found to have been committed for the purpose of avoiding arrest, without any evidence of such a motive, simply on the basis that the trial or appellate court cannot discern any other logical reason for it.

Florida's death penalty statute provides that one of the aggravating circumstances to be considered in determining whether a death sentence should be imposed is that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Fla. Stat. §921.141 (5) (e). The Supreme Court of Florida has construed this provision to require (at least where the victim is not a law enforcement officer) a clear showing that the dominant or only motive for the

murder was elimination of witnesses. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). See also Riley v. State, 366 So.2d 19 (Fla. 1978); Armstrong v. State, 399 So.2d 953 (Fla. 1981) (proof of requisite intent to avoid arrest and detection must be very strong). In numerous other cases in which the Florida Supreme Court has upheld a finding that a murder was committed for the purpose of avoiding arrest or detection, there has been at least some concrete evidence that a motivation to avoid arrest precipitated the killing. See e.g. Hitchcock v. State, 413 So.2d 741 (Fla. 1982) (defendant admitted to having choked and beaten victim in order to keep her from carrying out her threat to tell her mother of sexual battery); Vaught v. State, 410 So.2d 147 (Fla. 1982) (victim shot after pulling off assailant's mask and telling him he knew who he was and where he lived); Elledge v. State, 408 So.2d 1021 (Fla. 1981) (rape victim threatened to call police); Blair v. State, 406 So.2d 1103 (Fla. 1981) (defendant killed his wife, who threatened to report to police that he committed a sexual battery upon her daughter); White v. State, 403 So.2d 331 (Fla. 1981) (three co-perpetrators discussed the need for killing victims after mask of one of the perpetrators fell off; "wheelman" was later told not to worry because none of victims should live); Riley v. State, 366 So.2d 19 (Fla. 1978) (victim executed after one of perpetrators expressed concern for subsequent identification).

In the present case, there was no evidence that the killing was motivated - solely, dominantly, or at all - by desire to avoid arrest. The trial court merely found:

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

[Appendix A-7, D-4]

The observation that the victim's death had the effect of preventing any testimony on her part regarding the kidnapping and rape is obviously correct, but it begs the question of whether that is why she was killed. If the trial court's analysis were valid, then any felony murder would automatically support a finding of this aggravating circumstance, since by definition there has been a felony, by definition the victim is dead, and, as a logical consequence, the death of the victim prevents him from testifying about the felony.

The Florida Supreme Court expanded upon the trial court's finding, relying on additional facts in the record.

The record shows that the victim knew and could have identified defendant; that he encased the body in white plastic garbage bags and tied it with rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

Adams v. State, 412 So.2d 850, 856 (Fla. 1982);
[Appendix A-1]

The problem with this reasoning is that while there may indeed have been sufficient evidence to support an inference that petitioner concealed the body of the victim for the purpose of avoiding arrest, there was absolutely no evidence that avoiding arrest was his motivation for killing her in the first place.¹

With respect to the motive for the murder, the Florida Supreme Court appears to have agreed with the state's position [see Appendix

¹In Blair v. State, 406 So.2d 1103 (Fla. 1981), the defendant disposed of the victim by burying her remains in the back yard and pouring a concrete slab over the burial site. The trial judge did not rely on concealment of the body as support for his finding that the murder was committed for the purpose of avoiding arrest. Rather, that finding was based on the fact that the victim (the defendant's wife) had threatened to report to police that he had committed sexual battery upon her daughter. Analysis of the Blair fact pattern indicates that the murder there was committed for the purpose of avoiding arrest for the sexual battery of the daughter, and the concealment of the body was done in order to avoid arrest for the murder. The former circumstance is valid aggravation under Section 921.141(5)(e); the latter is not. See Washington v. State, 362 So.2d 658, 667 (Fla. 1978) (England, J. concurring); cf. Halliwell v. State, 323 So.2d 527 (Fla. 1975).

7-2-3], which was essentially "What other motive could there have been?" It is submitted that this falls far short of the requisite proof beyond a reasonable doubt.² While it is true that it is difficult to conceive of what would drive a person to kill an eight year old child, it is also hard for most people to imagine what would drive a person to commit a sexual battery on an eight year old child. The Florida Supreme Court attempted to apply logic to determine the motive for a crime which by its nature is often highly illogical. Sexual battery and irrational violence (including homicidal violence) are psychologically intertwined [see Surace v. State, 378 So.2d 895 (Fla. 3rd DCA 1980); State v. Aiken, 370 So.2d 1184 (Fla. 4th DCA 1979), aff'd 390 So.2d 1186 (Fla. 1980)]. A presumption that the killing of a rape victim (even a premeditated killing of a rape victim who is acquainted with her assailant) is necessarily motivated by the assailant's desire to avoid arrest because "why else would he do it", ignores the strong possibility that whatever unfathomable psychosexual motivations precipitated the sexual battery may have also motivated the killing.

In Godfrey v. Georgia, supra, 446 U.S. at 428, this Court stated that ". . . if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." The Georgia Supreme Court, consistent with its obligation to keep its death penalty statute within constitutional bounds, had previously construed the aggravating circumstance regarding an "outrageously or wantonly vile, horrible or inhuman" crime in such a way as to prevent its arbitrary application. This Court

²Florida requires proof of any aggravating circumstance found in support of a death sentence to be established beyond a reasonable doubt. Dixon v. State, 283 So.2d 1 (Fla. 1973); Phippen v. State, 389 So.2d 991 (Fla. 1980); Demps v. State, 395 So.2d 501 (Fla. 1981). The reasonable doubt standard has a federal constitutional basis as well, which should be applied with particular care to proof of facts necessary to permit imposition of the death penalty. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 328 (1970); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. ___, 68 L.Ed.2d 270 (1981).

said:

The Harris³ and Blake⁴ opinions suggest the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the §(b)(7) aggravating circumstance. The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate 'torture, depravity of mind, or an aggravated battery to the victim.' The second was that the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from Blake alone, was that the word, 'torture,' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death. Indeed, the circumstances proved in a number of the §(b)(7) death sentence cases affirmed by the Georgia Supreme Court have met all three of these criteria.

The Georgia courts did not, however, so limit §(b)(7) in the present case. No claim was made, and nothing in the record before us suggests, that the petitioner committed an aggravated battery upon his wife or mother-in-law or, in fact, caused either of them to suffer any physical injury preceding their deaths. Moreover, in the trial court, the prosecutor repeatedly told the jury - and the trial judge wrote in his sentencing report - that the murders did not involve 'torture.' Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases. In holding that the evidence supported the jury's §(b)(7) finding, the State Supreme Court simply asserted that the verdict was 'factually substantiated.'

Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind . . .'. We conclude that the answer must be no.

Godfrey v. Georgia, supra, 446 U.S. at 431-32.

³Harris v. State, 230 SE.2d 1 (Ga. 1976).

⁴Blake v. State, 236 SE.2d 637 (Ga. 1977).

Similarly, the Florida Supreme Court has adopted a constitutional construction of its §(5)(e) aggravating circumstance [Menendez v. State, supra, at 1282, holding that the aggravating circumstance of a murder committed for the purpose of avoiding arrest is not present, at least where the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was witness elimination], applied this construction with some consistency [see Hitchcock v. State, supra; Vaught v. State, supra; Elledge v. State, supra; Blair v. State, supra; White v. State, supra; Riley v. State, supra], but has now apparently abandoned it in favor of an open-ended construction which allows the trial court to find that the murder was committed for the purpose of avoiding arrest, without any evidence of such motivation, on the basis of "Why else would he do it?" As in Godfrey, such a construction is unconstitutionally vague and overbroad, as well as violative of the reasonable doubt standard.⁵ This Court should grant certiorari, in order to prevent the unchannelled and unreasoned application of this aggravating circumstance to justify imposition of the death penalty, now and in the future.

⁵ Godfrey could perhaps be distinguished from the present case on the basis that in Godfrey the death penalty was imposed solely on the basis of the §(b)(7) aggravating circumstance, while here there were two other aggravating circumstances found. Such a distinction would be illusory. In the present case there were also three mitigating circumstances found. Under Florida law, if the Supreme Court had invalidated the §(5)(e) aggravating circumstance, as it should have done, it would have either ordered the penalty reduced to life imprisonment without eligibility for parole for twenty-five years [see Vasil v. State, 374 So.2d 465 (Fla. 1979); Blair v. State, 406 So.2d 1103 (Fla. 1981); Halliwell v. State, 323 So.2d 557 (Fla. 1975)], or at least remanded the case to the trial court for resentencing without taking into consideration the invalid aggravating circumstance [see Godfrey v. State, 387 So.2d 333 (Fla. 1980); Lewis v. State, 337 So.2d 640 (Fla. 1979)].

82 5020
IN THE
CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Steven L. Bolotin
STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Aubrey Dennis Adams, Jr., #067227, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 2nd day of July, 1982.

Steven L. Bolotin
STEVEN L. BOLOTIN

NO.

82 5020

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

AUBREY DENNIS ADAMS, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

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Aubrey Dennis ADAMS, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 56134.

Supreme Court of Florida.

Feb. 11, 1982.

Rehearing Denied May 5, 1982.

The Circuit Court, Marion County, W. F. Edwards, J., convicted defendant of murder in the first degree, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) although erroneous or uninvited felony-murder instruction was given, evidence of premeditation was sufficient to render error harmless; (2) trial court did not err in admitting into evidence color photograph taken at scene where body was discovered and other photograph of body showing victim's hands taped together with adhesive tape; and (3) sentence of death was appropriate.

Affirmed.

Boyd, J., concurred in part and dissented in part with an opinion.

McDonald, J., concurred as to the conviction and dissented as to the sentence.

1. Homicide — 18(1)

Where indictment alleged that defendant murdered victim, unlawfully from premeditated design by strangling, State could prosecute under both theory of premeditation and theory of felony-murder.

2. Homicide — 236(1)

Evidence was sufficient to sustain finding that death was caused by strangulation, not by defendant placing his hand over mouth of victim so as to keep her from screaming or yelling.

3. Homicide — 340(1)

Although erroneous or uninvited felony-murder instruction was given, evidence of premeditation was sufficient to render erroneous instruction harmless, and thus re-

versal of conviction of murder in the first degree was not warranted.

4. Criminal Law — 1038.2, 1038.3

Request for an instruction or an objection over a failure to give an instruction is a prerequisite to raising an alleged error on appeal.

5. Criminal Law — 438(7)

If photograph is relevant to issue required to be proven in a case, fact that evidence is gruesome and offensive does not bar admissibility.

6. Criminal Law — 438(6)

In murder prosecution, color photograph taken at scene where body was discovered was relevant to show crime scene and premeditation and was admissible.

7. Criminal Law — 438(6)

Photograph, apparently taken somewhere other than at scene where victim's body was discovered, showing tying of hands and tape on victim's hands, was relevant to show premeditation and circumstances of death and was admissible.

8. Homicide — 354

Imposition of death sentence upon conviction of first-degree murder of eight-year-old girl, was proper, in view of evidence that capital felony was committed while defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit a rape or kidnapping, and in view of evidence indicating that killing was heinous, atrocious, and cruel. West's F.S.A. § 921.141(5)(d).

9. Homicide — 235

In sentencing phase of first-degree murder trial, there was sufficient competent evidence from which judge could properly have found that capital felony was committed while defendant was engaged in the commission of, or in attempt to commit, or flight after committing or attempting to commit, a rape or kidnapping. West's F.S.A. § 921.141(5)(d).

murder in the first degree.

2. 1038.3

Objection or an objection to an instruction is a prerequisite to raising an alleged error on appeal.

7)

Request for an instruction or an objection over a failure to give an instruction is a prerequisite to raising an alleged error on appeal.

3)

In murder prosecution, color photograph taken at scene where body was discovered was relevant to show crime scene and premeditation and was admissible.

3)

Photograph, apparently taken somewhere other than at scene where victim's body was discovered, showing tying of hands and tape on victim's hands, was relevant to show premeditation and circumstances of death and was admissible.

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ADAMS v. STATE

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Fla. 851

10. Homicide — 354

Trial judge did not err in finding that defendant's acts constituted an aggravating factor for purposes of determining whether to impose death sentence, despite contention that there was no crime of rape in Florida since rape statute was repealed and nomenclature of offense was changed to "sexual battery" or "attempt to commit sexual battery." West's F.S.A. §§ 794.011, 921.141(5)(d).

11. Constitutional Law — 258(1)

Due process requires only that law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. U.S.C.A. Const. Amend. 14.

12. Homicide — 354

There was sufficient competent evidence from which judge could have found that defendant committed capital felony in an effort to avoid or prevent a lawful arrest, in view of evidence that victim knew and could have identified defendant, that he encased body in white plastic garbage bags and tied it with rope, that he disposed of body in a desolate area, and that he concealed his crime effectively for period of time from January 22, 1978 to March 15, 1978. West's F.S.A. § 921.141(5)(e).

13. Homicide — 354

Fear and emotional strain preceding victim's almost instantaneous death may be considered as contributing to the heinous nature of a capital felony.

14. Homicide — 354

In view of defendant's statement indicating that eight-year-old victim was screaming prior to her strangulation by defendant, an adult, there was sufficient competent evidence in the record from which trial judge could have found that, for purposes of determining whether to impose death penalty, the murder was heinous, atrocious, and cruel.

15. Homicide — 354

For purposes of determining whether death sentence was appropriate, trial court did not err in failing to find that capacity of defendant to conform his conduct to re-

quirements of law was substantially im-
paired as a result of his marital distress.

Jim Smith, Atty. Gen., and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

Michael M. Corin, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and sentence of death.

The victim, eight years of age, left school on January 23, 1978, at about 2:30 P.M. Her body was found on March 15, 1978, in a wooded area near Ocala, Florida, by three men who were gopher hunting. The defendant's involvement in the disappearance and death of the victim was shown through circumstantial evidence and by statements, both written and oral, made by him to officers of the Ocala police department.

In his written statements, the defendant stated that he saw the victim walking home from school about a block and a half from her house and offered to give her a ride home. She got in the car and defendant drove away with her. The defendant remembered "being stopped somewhere and she was screaming and I put my hand over her mouth", and she quit breathing. In his oral statement the defendant said he had removed the clothes from the victim and used some cord which he carried in his car to tie her up so that she would fit into plastic bags. He also said that he tried to have sexual relations with her, but couldn't bring himself to do it. He denied having sexual relations with her.

Two expert witnesses testified that the cause of death was strangulation, but one of the experts stated that the child could have died from manual suffocation. One expert rendered an opinion that the victim's wrists had been taped prior to death. The defendant, in his oral statement, said that he had removed the victim's clothes, but

there was an indication from this statement that the clothes were removed after she quit breathing. However, the state argues that as a matter of logic, the clothes were removed prior to the time the wrists were bound, and, at that time, the victim was still alive.

The jury found the defendant guilty of murder in the first degree, and, after hearing evidence in the penalty phase of the trial, recommended that the defendant be sentenced to death.

The defendant argues that the trial court committed reversible error in failing to instruct the jury on the elements of the underlying felonies of sexual battery and kidnapping. The instructions of the court contained the following:

The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

Defendant correctly points out that the instruction included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature. Defendant argues that it is an indispensable requisite to a fair trial to instruct the jury on all essential elements of a crime, but the jury was not instructed on the essential elements of sexual battery and kidnapping, the only possible applicable felonies with which the state could have sought a conviction for felony murder. He relies on *Robles v. State*, 183 So.2d 789 (Fla.1966).

[1] The indictment alleged that defendant murdered the victim, unlawfully, from a premeditated design by strangling. Under this charge, the state could prosecute under both a theory of premeditation and a theory of felony-murder. *Barton v. State*, 193 So.2d 618 (Fla.2d DCA 1966), cert. denied, 201 So.2d 459 (1967).

[2] The record shows that defendant had visited in the home of the victim and she voluntarily accompanied defendant during the fatal ride. The evidence is sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim so as to keep her from screaming or yelling. Her hands were tied and taped behind her head, and a rope was around her neck. "Premeditation, like other factual circumstances, may be established by circumstantial evidence." *Larry v. State*, 104 So.2d 352, 354 (Fla.1958).

The final argument of the state was geared toward the single question of whether or not the evidence was sufficient to show a premeditated design on the part of defendant to murder the victim.

In *Knight v. State of Florida*, 394 So.2d 997, 1002 (Fla.1981), we considered that question:

The first issue concerns the trial judge's failure to instruct the jury on the elements of the underlying felony. The petitioner contends that our decision in *Robles v. State*, 183 So.2d 789 (Fla.1966), is determinative and that a trial court's failure to give an adequate instruction on the underlying felony is a fatal error even when such instruction has not been requested by the defendant. Subsequent to our opinion on the initial appeal in this case, we decided *State v. Jones*, 377 So.2d 1163 (Fla.1979), which reaffirmed our decision in *Robles v. State*.

The record in the instant case reflects that the trial judge gave the general definitive instructions for homicide but did not specifically instruct upon the elements of the underlying felony of kidnapping or robbery. There was no request or objection by petitioner's trial counsel to this failure to give these instructions.

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It is clear that in both *Robles* and *Jones* the primary charge was felony murder and the state in neither case contended the evidence was sufficient to establish premeditated murder. We expressly noted in *Jones* that there was no contention that there was sufficient evidence to establish premeditated murder. We conclude that where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice. See *Frazier v. State*, 107 So.2d 16 (Fla.1958).

[T]he record in this cause, and in particular the final argument of counsel, demonstrates that the state, although it mentioned felony murder, strongly argued premeditated murder to the jury. The record reflects that there is not only sufficient but overwhelming evidence of premeditated murder. We find that under the circumstances of this case and our review of the record that neither *Robles* nor *Jones* applies, but *Frazier* does apply. We are satisfied beyond a reasonable doubt that the failure to give the instruction at issue was not prejudicial and did not contribute to the petitioner's conviction. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

See also *McKennon v. State*, 403 So.2d 389 (Fla.1981).

[3] Although an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless.

[4] Of course, it may have been defendant's counsel's strategy to avoid, at all costs, any unnecessary reference to the underlying felonies committed by the defendant during the perpetration of the murder. Perhaps that explains his failure to make any objection to the instruction. Request for an instruction or an objection to a failure to give an instruction is a prerequisite to raising an alleged error on appeal. *Alford v. State*, 280 So.2d 479 (Fla. 3d DCA),

cert. denied, 284 So.2d 218 (1973); *Flagler v. State*, 198 So.2d 313 (Fla.1967).

[5-7] Defendant says that the trial court committed reversible error in admitting into evidence, over defendant's objection, two photographs of the victim. One photograph in color, was taken at the scene where the body was discovered. The other photograph, apparently taken somewhere else, is of the body and shows the victim's hands taped together with adhesive tape. The guidelines to be followed in determining the admissibility of photographic evidence were set forth by this Court in *State v. Wright*, 265 So.2d 361, 362 (Fla.1972), as follows:

[T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

If the photograph meets the guidelines set forth above, the fact that the evidence is gruesome and offensive does not bar the admissibility. *Foster v. State*, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). This is consistent with the reasoning in *Mardorff v. State*, 143 Fla. 64, 196 So. 625, 626 (1940), where the Court said:

Counsel contends that the pictures tended "to inflame the minds of the jury to a state of passion" and to "prejudice them against" the defendant rendering the evidence inadmissible. That this proof was prejudicial to the defendant there can be no doubt, but, as was so aptly stated in Wharton's Criminal Evidence, 11th Ed., Sec. 773, p. 1321:

"Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they

tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."

In *Lindberg v. State*, 134 Fla. 786, 184 So. 662, we quoted the above authority and approved exhibition to the jury of a picture showing the body of the murder victim.

The colored photograph was relevant to show the crime scene and premeditation. The other photograph, showing the tying of the hands and the tape on the victim's hands, was relevant to show premeditation and the circumstances of death.

At trial the state sought to introduce two other photographs which were excluded by the trial judge upon the objection of the defendant. The trial judge exercised reasoned judgment and prohibited the introduction of duplicitous photographs. See *Alford v. State*, 207 So.2d 433 (Fla.1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1975). The trial court did not commit error in admitting these photographs into evidence.

[8] We now turn to the propriety of the death sentence. The trial court found three aggravating circumstances: 1) that the capital felony was committed while defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; 3) that the capital felony was especially heinous, atrocious, or cruel.

The trial judge found three mitigating circumstances: 1) that the defendant had no significant history of prior criminal activity; 2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 3) that the defendant's age (20) was of significance.

[9] The jury recommended death and the trial judge concurred in that recommendation.

In support of his finding of fact that the capital felony was committed while the defendant was engaged in or attempting to commit or flight after committing or attempting to commit a rape or kidnapping (Fla.Stat. § 921.141(5)(d)), the judge stated:

That the capital felony was committed while the Defendant was engaged in or attempting to engage in or in the flight after committing kidnapping, is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, States Exhibit # 49, in which he says:

After getting off from work as a prison guard at Lowell Prison, he went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trina Gail Thornley, age 8, and saw her walking home from school about one and a half blocks from her home. He knew the victim and offered to give her a ride home. She got into Defendant's car and he started towards her home, then turned away towards the Pine Street Shopping Center; then out State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

The above fact of kidnapping is also supported by the testimony at the trial of the Defendant by police officers S. H. Stephenson, John E. Fluno and W. R. Fugitt regarding the written statements made by the Defendant and the oral statements concerning her death and her disappearance that he gave the three officers.

Kidnapping is also evidenced by the testimony of Trina Gail Thornley's third grade school teacher, Carolyn Andrews, who observed the victim leave school at approximately 2:20 P.M. on January 23, 1973, and by Trina Gail Thornley's aunt and uncle, Lawson and Theresa Hopper, and the victim's sister, Tracy Thornley, who stated that the victim, Trina Gail

Thornley, did not return home from school that day as she usually did.

For additional support that 921.141(6) [sic] (d), Florida Statutes, is proved beyond and to the exclusion of a reasonable doubt, is the evidence proving that the capital felony was committed while the Defendant was engaged in or attempting to engage in or flight after committing rape is proven beyond and to the exclusion of a reasonable doubt by the testimony of Officer Stephenson who was present at the Defendant's interview, who stated that Defendant Adams said that he thought he tried to but couldn't do it, or couldn't bring himself to do it, and that her body was found nude with her hands taped behind her back, such tape applied to the victim, by sworn testimony of pathologist, Doctor Gertrude Warner of Ocala, Florida, as being applied around the wrists while the victim, Trisa Gail Thornley, was still alive.

Defendant argues that these findings do not prove that the victim's death occurred during or after the commission of a kidnapping. The state replies that the evidence is sufficient to show the crime of kidnapping was committed and cites *Miller v. State*, 233 So.2d 448 (Fla. 1st DCA 1970).

In *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.), cert. denied, — U.S. —, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), we described our function in reviewing a death sentence:

This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in *Elledge v. State*, 346 So.2d 998 (Fla.1977), where we remanded for resentencing because the procedure was flawed—in that case a nonstatutory aggravating circumstance was considered. See also *Brown v. State*, 381 So.2d 600 (Fla.1980); *Kampff v. State*, 371 So.2d 1007 (Fla.1979).

The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. *Proffitt v. Florida*, 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913] (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1951, 40 L.Ed.2d 295] (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. See *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Burch v. State*, 343 So.2d 831 (Fla.1977); *Jones v. State*, 332 So.2d 618 (Fla.1976).

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

(Footnote omitted.) There appears to be sufficient competent evidence in the record from which the judge could properly find that the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a rape or kidnapping.

[10, 11] Defendant argues that there is no crime of rape in Florida and that the

trial judge used a non-statutory aggravating factor in imposing the death sentence. The statute penalizing rape, section 794.01, Florida Statutes (1972), was repealed by chapter 74-121, section 1, Laws of Florida. Acts which would have constituted rape or attempted rape would constitute a sexual battery or attempt to commit sexual battery by virtue of section 794.011, Florida Statutes (1977). The word "rape" in section 921.141(5)(d) had not yet been changed to "sexual battery". Due process requires only that the law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. The act itself, rather than its nomenclature, constitutes the aggravating circumstances. The trial judge did not err in finding defendant's acts constituted an aggravating factor.

[12] Defendant next argues that the trial judge erred in finding that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 921.141(5)(e), Fla.Stat. The trial judge made the following finding of fact:

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

The record shows that the victim knew and could have identified defendant; that he encased the body in white plastic garbage bags and tied it with rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

In *Riley v. State*, 366 So.2d 19 (Fla.1978), the robbery victim, who knew and could identify the defendant, had been bound and

gagged. He was then shot in the head after one of the perpetrators expressed a concern for subsequent identification. This Court concluded that the aggravating circumstance existed because the defendant had killed the victim to avoid identification and arrest. See also *Hoy v. State*, 353 So.2d 826 (Fla.1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jackson v. State*, 366 So.2d 752 (Fla.1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

There was sufficient competent evidence in the record from which the judge could find that defendant committed this capital felony in an effort to avoid or prevent a lawful arrest.

Defendant also says that the trial court erred in finding that the capital felony was especially heinous, atrocious, or cruel. The trial judge made the following finding of fact:

That the capital felony was especially heinous, atrocious or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Doctors Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State Exhibit # 17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley as shown in evidence by State Exhibit # 16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home.

Defendant argues that this aggravating circumstance is devoid of factual and legal support. We disagree.

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ADAMS v. STATE

Ch. 88, Fla. 412 So.2d 856

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[13, 14] The fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony. *Knight v. State*, 338 So.2d 201 (Fla.1976). A homicide committed through strangulation has been held to be especially heinous, atrocious, and cruel. *Alvord v. State*, 222 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). From defendant's statement we find that the victim was "screaming" prior to death. A frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel. There was sufficient competent evidence in the record from which the trial judge could find the presence of this aggravating circumstance.

[15] Although the trial judge found, as a mitigating factor, that the capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance, the defendant says that there should be an independent determination and finding that at the time the crime was committed the defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. The defendant says that his deteriorating marital situation and his wife's apparently blatant infidelity with one of his friends led to his extreme mental or emotional disturbance and clearly hampered his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law. There is little, or no, causal relationship between defendant's marital problems and an eight-year-old little girl. There was no testimony that defendant had suffered from mental illness in the past. An expert witness testifying for the defense said that, in his opinion, the defendant knew the difference between right and wrong on the date of the commission of the offense. The trial court did not err in failing to find that the capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

The findings of the trial judge were sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances. There being no reversible error, the judgment and sentence of the trial judge are affirmed.

It is so ordered.

SUNDBERG, C. J., and OVERTON and ALDERMAN, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

McDONALD, J., concurs as to conviction and dissents as to sentence.

BOYD, Justice, concurring in part and dissenting in part.

I concur in that part of the majority opinion affirming appellant's conviction of murder in the first degree.

One of the principal functions of this Court in considering cases in which the death penalty has been ordered is to review the aggravating and mitigating circumstances to assure that similar punishment is given for similar crimes.

The trial judge found three mitigating circumstances: (1) that the defendant had no significant history of prior criminal activity; (2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) that the defendant's age (20) was of significance.

In weighing the aggravating and mitigating circumstances of this case, and comparing it with prior similar crimes of violence, it is my opinion that the law requires this Court to order a reduction in the sentence to life imprisonment without eligibility for parole for twenty-five years.



IN THE SUPREME COURT OF FLORIDA

AUBREY DENNIS ADAMS, JR., :

Appellant, :

vs. : CASE NO. 56,134

STATE OF FLORIDA, :

Appellee. :

MOTION FOR REHEARING

COMES NOW the appellant, AUBREY DENNIS ADAMS, JR., pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, and moves this Court for rehearing in the above-styled case. As grounds therefor, appellant states:

1. The trial court, in imposing a death sentence upon appellant, found three aggravating circumstances and three mitigating circumstances. He found, as one of the aggravating circumstances, that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. As support for this finding, the trial court stated:

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

On appeal, this Court concluded that there was sufficient competent evidence to support the trial court's finding, and said:

The record shows that the victim knew and could have identified defendant; that he encased the body in white plastic garbage bags and tied it with ropes; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

In Riley v. State, 366 So.2d 19 (Fla. 1978), the robbery victim, who knew and could identify the defendant, had been bound and gagged. He was

then shot in the head after one of the perpetrators expressed a concern for subsequent identification. This Court concluded that the aggravating circumstances existed because the defendant had killed the victim to avoid identification and arrest. See also Hoy v. State, 353 So.2d 826 (Fla. 1977); cert. denied, 439 U.S. 920 (1978); Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

2. Appellant believes that this Court may have overlooked or misapprehended the fact that, while there may indeed have been sufficient evidence to support an inference that appellant concealed the body of the victim for the purpose of avoiding arrest, there is absolutely no evidence whatsoever that avoiding arrest was his motivation for killing her in the first place. According to appellant's confession, he had tried to have sexual relations with the victim but couldn't bring himself to do it. The victim was screaming, appellant put his hand over her mouth, and she quit breathing. This Court found that the circumstantial evidence, including the fact that a rope was around the victim's neck and her hands were bound, was sufficient to sustain a finding that the killing was premeditated and caused by strangulation rather than by suffocation. However, while these circumstances may indicate that the killing may have been premeditated, they do not in anyway indicate what the motive for the killing may have been. The fact that no particular motive is apparent does not preclude a finding of premeditation, see Lowe v. State, 90 Fla. 255, 105 So. 829 (1925), Matthews v. State, 130 Fla. 53, 177 So. 321 (1937). But unless the evidence showed beyond a reasonable doubt that avoiding arrest was appellant's sole or dominant motive for killing the victim, the aggravating factor cannot be sustained. See Menendez v. State, 368 So.2d 1278 (Fla. 1979) (aggravating circumstance of intent to avoid arrest is not present, at least where victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was elimination of witness); Riley v. State, 366 So.2d 19 (Fla. 1978); Armstrong v. State, 399 So.2d 953 (Fla. 1981) (proof of requisite intent to avoid arrest and detection

must be very strong); Dixon v. State, 283 So.2d 1 (Fla. 1973); Phippen v. State, 389 So.2d 991 (Fla. 1980); Demps v. State, 395 So.2d 501 (Fla. 1981) (evidence must establish existence of the aggravating circumstance beyond a reasonable doubt). Florida Statute Section 921.141(5)(e) establishes an aggravating circumstance only where "[t]he capital felony [i.e. the murder] was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody". The fact of concealment of a murder victim's body may support an inference that the concealment was done for the purpose of avoiding detection, but it certainly does not support an inference that the murder itself was done for that reason. See Washington v. State, 362 So.2d 658 (Fla. 1978) (England, J., concurring); cf. Halliwell v. State, 323 So.2d 557 (Fla. 1975); Blair v. State, 406 So.2d 1103 (Fla. 1981).

3. In prior cases in which this Court has upheld a finding that a murder was committed for the purpose of avoiding arrest or detection (where the victim was not a law enforcement officer), there has been at least some concrete evidence that a motivation to avoid arrest precipitated the killing. See e.g. Hitchcock v. State, ___ So.2d ___ (Fla. 1982) (Case No. 51,108, opinion filed February 25, 1982) (1982 FLW 99) (defendant admitted to having choked and beaten victim in order to keep her carrying out her threat to tell her mother of sexual battery); Vaught v. State, ___ So.2d ___ (Fla. 1982) (Case No. 52,835, opinion filed January 7, 1982) (1982 FLW 13) (victim shot after pulling off assailant's mask and telling him he knew who he was and where he lived); Elledge v. State, 408 So.2d 1021 (Fla. 1981) (rape victim threatened to call police); Blair v. State, 406 So.2d 1103 (Fla. 1981) (defendant killed his wife, who threatened to report to police

that he committed sexual battery upon her daughter);¹ White v. State, 403 So.2d 331 (Fla. 1981) (three co-perpetrators discussed the need for killing victims after mask of one of the perpetrators fell off; "wheelman" was later told not to worry because none of victims should live); Riley v. State, 366 So.2d 19 (Fla. 1978) (victim executed after one of perpetrators expressed concern of subsequent identification).

4. In the present case, there was no evidence that the killing was motivated - solely, dominantly, or ~~not~~ at all - by appellant's wish to avoid detection or arrest. Conceding arguendo that his concealment of the body was indicative of a desire to avoid arrest for the murder, there is absolutely no indication of what may have motivated the murder itself (assuming that it was premeditated). The trial court's observation that the victim's death had the effect of preventing any testimony on her part regarding the kidnapping and rape is obviously correct, but it begs the question of whether that is why she was killed. If the trial court's analysis were valid, then any felony murder would automatically support a finding of this aggravating circumstance, since by definition there has been a felony, by definition the victim is dead, and, as a logical consequence, the death of the victim prevents him from testifying about the felony. Even considering the additional circumstances emphasized by this Court, that premeditation could be inferred from the physical evidence, that the victim and appellant knew each other, and that the body had been placed in a plastic bag and concealed in a desolate area, there is still no evidence that the killing was motivated by desire to avoid arrest. Concealment of the body, as previously argued, only indicates the motive for concealing the body, not the motive for committing the murder. With respect to

¹In Blair, the defendant disposed of the victim by burying her remains in the back yard and pouring a concrete slab over the burial site. The trial judge did not rely on concealment of the body as support for his finding that the murder was committed for the purpose of avoiding arrest. Analysis of the Blair fact pattern indicates that the murder there was committed for the purpose of avoiding arrest for sexual battery of the daughter, and the concealment of the body was done in order to avoid arrest for the murder. The former circumstance is valid aggravation under Section 921.141(5)(e); the latter is not.

premeditation, the Court appears to have agreed with the state's position (see Brief of Appellee at 43-44) which was essentially "What other motive could there have been?" It is submitted that this falls far short of the requisite proof beyond a reasonable doubt. While it is true that it is difficult to conceive of what would drive a person to kill an eight year old child, it is also hard for most people to imagine what would drive a person to commit a sexual battery on an eight year old child. The Court is attempting to apply logic to determine the motive for a crime which by its nature is often highly illogical. Sexual battery and irrational violence (including homicidal violence) are psychologically intertwined [see Surace v. State, 378 So.2d 895 (Fla. 3rd DCA 1980); State v. Aiken, 370 So.2d 1184 (Fla. 4th DCA 1979), aff'd 390 So.2d 1186 (Fla. 1980)]. A presumption that the killing of a rape victim (even a premeditated killing of a rape victim who is acquainted with her assailant) is necessarily motivated by the assailant's desire to avoid arrest because "why else would he do it", ignores the strong possibility that whatever unfathomable psychosexual motivations precipitated the sexual battery may have also motivated the killing. Where, as here, there is evidence of premeditation but absolutely no evidence tending to indicate motivation one way or the other, to simply assume that appellant "must have" decided to kill the victim because she knew him and could identify him is patently insufficient to prove this aggravating circumstance beyond a reasonable doubt. See Demps v. State, supra, at 505 n.5 and 506. In Menendez v. State, supra, at 1282, this Court said, "we cannot assume Menendez's motive; the burden was on the state to prove it."

5. For the reasons stated above, the death penalty imposed upon appellant, based in part on the trial court's finding that the capital felony was committed for the purpose of avoiding arrest, is violative of the Eighth and Fourteenth Amendments to the United States Constitution. See Godfrey v. Georgia, 446 U.S. 420 (1980) (overly broad and vague construction of a statutory

aggravating circumstance violates Eighth and Fourteenth Amendments); see also In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979); Addington v. Texas, 441 U.S. 418 (1979); Bullington v. Missouri, ___ U.S. ___, 101 S.Ct. ___, 68 L.Ed.2d 270 (1981) (constitutional basis of reasonable doubt standard).

6. In view of the invalidity of the aggravating circumstance that the murder was committed for the purpose of avoiding arrest, two aggravating circumstances and three mitigating circumstances would remain. Appellant submits that it would be appropriate for this Court to remand this case to the trial court with instructions to reduce the penalty to life imprisonment without eligibility for parole for twenty five years. See Blair v. State, supra; Halliwell v. State, supra. In the alternative and at the least, appellant submits that this Court should remand the case to the trial court for the purpose of resentencing appellant without taking into consideration the aggravating circumstance delineated in Florida Statute Section 921.141(5)(e). See Gafford v. State, 387 So.2d 333 (Fla. 1980); Lewis v. State, 377 So.2d 640 (Fla. 1979).

WHEREFORE, appellant respectfully requests that this Court grant his motion for rehearing.

Respectfully submitted,

for P. Douglas Brinkmeyer

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished by hand-delivery to David P. Gauldin, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Aubrey Dennis Adams, #067227 Post Office Box 747, Starke, Florida 32091; on this 26th day of March, 1982.

for *P. Douglas Brinkmeyer*
STEVEN L. BOLOTIN

RECEIVED

U.S. DISTRICT COURT
TALLAHASSEE, FLORIDA

Hon. James L. Thibault, Judge
Hon. William P. Edwards, Judge

Steven L. Bolotin, Attorney
David P. Gauldin, Attorney

FILED
CLERK U.S. DISTRICT COURT

D. L. ...
Date: ...

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 5, 1982

AUBREY DENNIS ADAMS, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

**

** CASE NO. 56,134

** Circuit Court Case No. 78-366
** (Marion) CF-A-01

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On consideration of the motion for rehearing filed by attorney for appellant, and response thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, OVERTON and ALDERMAN, JJ., Concur
BOYD and McDONALD, JJ., Dissent

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PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: *Dulaine Causeaux*
Deputy Clerk

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cc: Hon. Frances E. Thigpin, Clerk
Hon. William F. Edwards, Judge

Steven L. Bolotin, Esquire
David P. Gauldin, Esquire

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay

statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
- (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
- (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) **REVIEW OF JUDGMENT AND SENTENCE.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60

days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) **AGGRAVATING CIRCUMSTANCES.**—Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) **MITIGATING CIRCUMSTANCES.**—Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—§272a, ch. 1934, 1935; C.S. 1940 Supp. 606X240, §119, ch. 70-588 §1, ch. 72-72, §3, ch. 72-724.

*Note.—Bracketed word inserted by the editors.

Note.—See former §919.23.

STATE OF FLORIDA

78-474 CP

VS

AUBREY DENNIS ADAMS, JR.
Defendant,

FINDINGS OF FACT

THIS CAUSE coming on to be considered pursuant to the provisions of Section 921.141, Florida Statutes, after (a) the conviction of the Defendant, Aubrey Dennis Adams, Jr., of Murder in the First Degree, by a duly impaneled jury, and (b) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of the death sentence, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed, and the pre-sentence investigation report submitted by the Florida Parole Commission, the undersigned concludes and determines:

1, That the State proved beyond and to the exclusion of a reasonable doubt the following aggravating circumstances, to wit:

(a) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb,

(b) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody,

(c) The capital felony was especially heinous, atrocious and cruel,

And the State failed to prove beyond and to the exclusion of a reasonable doubt the following aggravating circumstances, to wit:

(a) The capital felony was committed by a person under sentence of imprisonment,

(b) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person,

(c) The Defendant knowingly created a great risk of death to many persons,

(d) The capital felony was committed for pecuniary gain,

(e) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws,

That the Defendant, Aubrey Dennis Adams, Jr. established the following mitigating circumstances, to wit:

(a) The defendant has no significant history or prior criminal activity,

(b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance,

(c) The age of the Defendant at the time of the crime,

And that the Defendant failed to establish by evidence any other mitigating circumstances, including, but not limited to 921.141 (7) c, d, e, f, Florida Statutes.

FINDINGS OF FACT

That the capital felony was committed while the Defendant was engaged in or attempting to engage in or in the flight after committing kidnapping, is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, States Exhibit #49, in which he says:

After getting off work as a prison guard at Lowell Prison, he

went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trisa Gail Thornley, age 8, and saw her walking home from school about one and a half blocks from her home. He knew the victim and offered to give her a ride home. She got into Defendant's car and he started towards her home then turned away towards the Pine Street Shopping Center then cut State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

The above fact of kidnapping is also supported by the testimony at the trial of the Defendant by police officers S.H. Stephenson, John E. Fluno and W.R. Fugitt regarding the written statements made by the Defendant and the oral statements concerning her death and her disappearance that he gave the three officers.

Kidnapping is also evidenced by the testimony of Trisa Gail Thornley's third grade school teacher, Carolyn Andrews, who observed the victim leave school at approximately 2:20 P.M. on January 23, 1978 and by Trisa Gail Thornley's aunt and uncle, Lawson and Theresa Hopper, and the victim's sister, Tracy Thornley, who stated that the victim, Trisa Gail Thornley did not return home from school that day as she usually did. /


For additional support that 921.141 (6) (d), Florida Statutes, is proved beyond and to the exclusion of a reasonable doubt, is the evidence proving that the capital felony was committed while the Defendant was engaged in or attempting to engage in or flight after committing rape is proven beyond and to the exclusion of a reasonable doubt by the testimony of Officer Stephenson who was present at the Defendants interview, who stated that Defendant Adams said that he thought he tried to but couldn't do it, or couldn't bring himself to do it, and that her body was found nude with her hands taped behind her back, such tape applied to the victim, by sworn testimony of pathologist, Doctor Gertrude Warner of Ocala, Florida, as being applied around the wrists while the victim, Trisa Gail Thornley, was still alive.

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.*

That the capital felony was especially heinous, atrocious or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Doctors Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State Exhibit #17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley as shown in evidence by State Exhibit #16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home. 0

Based exclusively and only upon (1) the records and the evidence properly introduced and admitted during the trial, sentencing proceeding and pre-sentence investigation and (2) the sufficient aggravating circumstances set forth above and finding that three mitigating circumstances, the fact that the Defendant was only 20 years of age at the time of the crime, and that the Defendant was under the influence of extreme mental or emotional disturbance, in that Defendant and his wife were getting a divorce, and (3) that the Defendant had no significant prior criminal activity are insufficient to outweigh the aggravating circumstances, the undersigned accepts and agrees with the Advisory Sentence by the jury, recommending that the death sentence should be

imposed on the Defendant, AUBREY DENNIS ADAMS, JR.


WILLIAM F. EDWARDS
CIRCUIT JUDGE, Fifth Judicial Circuit

IN THE SUPREME COURT OF FLORIDA

AUBREY DENNIS ADAMS, JR., :
Appellant, :
v. : CASE NO. 56,134
STATE OF FLORIDA, :
Appellee. :

ON APPEAL FROM THE
FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL M. CORIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

ISSUE III

THE TRIAL COURT ERRED BY IMPOSING THE DEATH SENTENCE UPON THE APPELLANT WHICH IMPOSITION, IF SUSTAINED AND CARRIED OUT, WILL DEPRIVE HIM OF HIS LIFE WITHOUT DUE PROCESS OF LAW, DENY HIM EQUAL PROTECTION OF THE LAW AND SUBJECT HIM TO CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF THE CONSTITUTIONS OF FLORIDA AND THE UNITED STATES.

The trial judge found three (3) aggravating circumstances: (1) that the capital felony was committed while the appellant was engaged or was an accomplice in the commission of, or attempt to commit, or flight after committing or attempting to commit a rape and/or kidnapping; (2) that the capital felony was committed for the purposes of avoiding or preventing a lawful arrest or effecting an escape from custody, and; (3) that the capital felony was especially heinous, atrocious or cruel. The trial judge found three (3) mitigating circumstances: (1) that the appellant had no significant history or prior criminal activity; (2) that the capital felony was committed while the appellant was under the influence of extreme mental or emotional disturbance, and; (3) the fact of the appellant's age in that he was only twenty (20) years old at the time of the crime. (TS-8-14; R-143-147) With a three on three balance achieved, the judge concluded that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and sentenced the appellant to die. In so doing, the judge commenced a process which, if not interrupted, will result in an unconstitutional punishment of irreparable proportion under the Eighth and Fourteenth Amendments to the Constitution of the United States and under

Section 9 and Section 17 of Article I of the Constitution of the State of Florida.

As will be seen shortly, the trial judge not only erroneously found that certain of the above-enumerated aggravating circumstances existed beyond a reasonable doubt, he failed to find, consider, and weigh the existence of a mitigating factor which is established in Section 921.141, Florida Statutes, and which was fully supported by the evidence adduced at the penalty phase of trial. It will thus be conclusively demonstrated that the judge engaged in a "mere counting process" in deciding that the mitigating circumstances did not outweigh the aggravating circumstances. A numerical summing is impermissible. State v. Dixon, 283 So.2d 1 (Fla. 1973) The factors must be intelligently and comprehensively weighed. Huckaby v. State, 343 So.2d 329 (Fla. 1977) Reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment is the keystone of the constitutionality of capital punishment. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed., 2d 913, 96 S.Ct. 2960 (1976) and Dixon, supra. The question of whether a death sentence is grounded on reason is one for this Court to decide. Indeed, when the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted. Songer v. State, 322 So.2d 481 (Fla. 1975).

Meaningful appellate review by this Court requires a reweighing of the factors relevant to the sentence imposed.

Halliwell v. State, 323 So.2d 557 (Fla. 1975) Meaningful appellate review has seen this Court find mitigating circumstances to exist where none were found by the trial court. Huckaby v. State, supra. Meaningful appellate review has seen this Court vacate a jury recommended, trial judge imposed, death sentence when the aggravating and mitigating factors were numerically equal but the aggravating circumstances were outweighed by the mitigating circumstances. Huckaby, supra. Meaningful appellate review of each death sentence may be long and laborious but unless at least four members of this Court agree that it is warranted, it cannot lawfully be carried out, notwithstanding, that the sentence was jury advised and trial judge imposed. Vasil v. State, ___ So.2d ___, opinion filed June 14, 1979, Case No. 46,654. Meaningful appellate review of the appellant's death sentence should cause this Court to vacate it and remand the matter to the trial court for imposition of a life sentence. This is true, even if similar judicial assessment, does not require a new trial with regard to the appellant's guilt.

To facilitate the disposition of this argument, the appellant's complaints with the trial judge's imposition of the death sentence will be specifically and separately discussed below. Before entering into this discussion it might be wise to note that this Court and other appellate courts in Florida have long been committed to the doctrine that a verdict of guilt of a felony should not be upheld when based on guesswork, suspicion or speculation. Where the evidence, considered as a whole, entirely fails to disclose any substantial proof

of material fact necessary to be alleged and proved a judgment of conviction will be reversed. Armstrong v. State, 107 Florida 494, 145 So.2d 12, (Fla. 1932); Smith v. State, 228 So.2d 440 (2d DCA 1969); Williams v. State, 308 So.2d 595 (1 DCA 1975), cert. den., 321 So.2d 555 (Fla. 1975), and Hornbrook v. State, 321 So.2d 127 (1 DCA 1975). Due process of law requires no less a standard be applied to penalty findings made by trial courts in death cases. Presnell v. Georgia, ___ U.S. ___ 58 L.Ed., 207 99 S.Ct. ___ (1978). As will be shown, these time honored standards were not met nor were they even approached in the present case.

A.

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED IN OR ATTEMPTING TO ENGAGE IN OR FLIGHT AFTER COMMITTING KIDNAPPING.

In support of his Finding of Fact with regard to this kidnapping issue, the judge stated:

. . . kidnapping is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, States Exhibit #49, in which he says:

After getting off work as a prison guard at Lowell Prison, he went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trisa Gail Thornley, age 8, and saw her walking home from school about one and a half blocks from her home. He knew the victim and offered to give her a ride home. She got into Defendant's car and he started towards her home then turned away towards the Pine Street Shopping Center then out State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

practice of using non-statutory aggravating factors in the weighing process. Under the provisions of Section 921.141, Florida Statutes, aggravating circumstances enumerated in the statute must be found to exist before a death sentence may be imposed. The specified statutory aggravating circumstances are exclusive: no others may be used for that purpose. Purdy v. State, 343 So.2d 4, 6 (Fla. 1977) Regardless of the existence of other authorized aggravating factors, this Court has repeatedly held that it must "... guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) See also: Miller v. State, 312 So.2d 884 opinion filed May 10, 1979, Case No. 50,606. The aggravating circumstances in Section 921.141(5)(d), Florida Statutes, which actually define the crimes for which the death penalty is applicable, Dixon, supra, cannot be expanded to include crimes that do not exist.

C.

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

On this issue the court below found as follows:

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented

any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

(R-146)

This finding by the court is not only unsupported by the evidence in the case, but also, it is unsupported by the case authorities which have construed Section 921.141(5)(e), Florida Statutes. To conclude otherwise would be to convert ipse dixit into proof beyond a reasonable doubt.

Section 921.141(5)(e), Florida Statutes has been narrowly construed to apply only to those circumstances where, when the victim is not a law enforcement officer, there is clear evidence that the dominant or only motive for the murder was the elimination of a witness. Proof of the requisite intent to avoid arrest must be very strong. Such a motive for a killing cannot be assumed, the burden is on the State to prove it. Menendez v. State, 368 So.2d 1278 (Fla. 1979) and Riley v. State, 366 So.2d 19 (Fla. 1978). In Riley the victim, who could have identified the appellant, had been immobilized and rendered helpless. He was, nevertheless, executed after one of the perpetrators expressed a concern for subsequent identification. On these facts, this court stated and cautioned as follows:

We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

363 So.2d at 22.

Thereafter in Menendez, supra, it was said:

There is also considerable doubt that this murder was committed for the purpose of avoiding arrest within the contemplation of our statute. The state urges (with some logic)

that any murder committed by means of a pistol fitted with a silencer indicates a motivation to avoid arrest and detection. The presumption accorded the instrument of murder by this reasoning, however, carries us too far. Were this argument accepted, then the perpetration of murder with a knife would similarly add an aggravating circumstance to the life/or death equation, since it is less detectable than a firearm. This mechanical application of the statute would divert the life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require. In Riley v. State, 366 So.2d 19 (Fla. 1978), we held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Here, unlike Riley, we do not know what events preceded the actual killing; we only know that a weapon was brought to the scene, which, if used, would minimize detection. We cannot assume Menendez's motive; the burden was on the state to prove it.

368 So.2d 1282. Footnotes omitted.

Compare also the trial court's Findings of Fact in Gibson v. State, 351 So.2d 948 (Fla. 1977) at page 951, footnote #5.

As applied to the facts of the present case, Riley and Menendez compel a rejection of this aggravating circumstance. There was proof that the appellant knew the victim and that he picked her up to take her home but thereafter took her in a different direction. They stopped somewhere and she was screaming and the appellant put his hand over her mouth and she quit breathing. The fact that her body was not found until some seven weeks after her disappearance does not prove that she was killed with the intent to avoid a lawful arrest. This after-the-fact factual finding by the trial judge is irrelevant. Indeed, if the trial court's reasoning were to be adopted, it would result in the very type of mechanical application of the

statute which this Court has sought to avoid, lest the statute become unconstitutional in its application, if not on its face. Even if the appellant sought to cover up the death of the victim, such cover up cannot and does not provide a dominant or sole motive for the killing. This Court cannot assume the appellant's motive and it is certain that the appellee did not fulfill its burden of proof in this regard.

D.

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The trial judge made the following observations in support of his finding that the crime was especially heinous, atrocious or cruel:

That the capital felony was especially heinous, atrocious, or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Drs. Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State Exhibit #17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley as shown in evidence by State Exhibit #16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home.

(R-146)

A close look at the actual facts of this case will amply demonstrate that the trial judge erroneously concluded that the

IN THE SUPREME COURT OF FLORIDA

AUBREY DENNIS ADAMS, JR.,

Appellant,

-vs-

CASE NO. 56,134

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

JIM SMITH
Attorney General

DAVID P. GAULDIN
Assistant Attorney General

THE CAPITOL
Tallahassee, Fl 32301
(904) 488-0600

Counsel for the Appellee.

RECEIVED

OCT 30 1979

PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

have a new name.

In Wainwright v. Stone, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) the Supreme Court noted that the existence of previous applications of a particular statute to one set of facts forecloses lack-of-fair warning challenges to subsequent prosecutions of factually identical conduct. See also Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) [Due Process Clause requires only that the law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden.]

The trial court harmlessly erred when it called the crime Appellant committed rape or attempted rape; but it did not err in finding the Appellant's acts constituted an aggravating factor.

C.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE STATE HAD PROVED BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The Appellant concedes that he knew the victim, that he picked the victim up after she left school, that he committed the acts detailed in his confession. (Appellant's brief at 40). The Appellant, as demonstrated by the arguments infra, had committed or had attempt to committ sexual battery upon the victim and had kidnapped the victim. What possible motive other than concealment of his crimes, one of which car-

ried with it a possible death sentence, could there have been?

In Riley v. State, 366 So.2d 19 (Fla. 1978), the robbery victim, who knew and could identify the defendant, had been bound and gagged. He was then shot in the head after one of the perpetrators expressed a concern for subsequent identification. This Court concluded that the circumstance existed because the defendant had killed the victim to avoid identification and arrest.

Compare the facts of this case with the following, all of which found the circumstance: Hoy v. State, 353 So.2d 826 (Fla. 1977) [Rape victim and witness killed to avoid detection.]; Jackson v. State, 366 So.2d 752 (Fla. 1978) [Robbery victim was transported from robbery scene to a desolate area and shot.].

The facts in the instant case show that the Appellant kidnapped and sexually assaulted an eight year old girl who knew and could have identified him; that he encased the body in black plastic garbage bags and tied it with rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time that encompassed January 23, 1978 to March 15, 1978.

Clearly, the trial court did not err in finding beyond and to the exclusion of a reasonable doubt that the Appellant committed his capital felony in the effort to avoid or prevent a lawful arrest.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

AUBREY DENNIS ADAMS, JR.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

AUBREY DENNIS ADAMS, JR., petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

Steven L. Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

COUNSEL FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Case No. 1 82 5020

AUBREY DENNIS ADAMS, JR., :

Petitioner, :

v. :

STATE OF FLORIDA, :

Respondent. :

AFFIDAVIT OF FILING BY
FIRST CLASS UNITED STATES
MAIL PURSUANT TO RULE 28.2

CAME AND APPEARED BEFORE ME, the undersigned authority,
STEVEN L. BOLOTIN, Assistant Public Defender, attorney for
petitioner, who first being duly sworn, deposes and says:

That on July 2, 1982, he placed in a United States Post
Office box, with first class postage prepaid, an original
and one copy of the Petition for Writ of Certiorari to the
Florida Supreme Court in the above-referenced case, and said
Petition was duly and properly addressed to the Clerk of the
United States Supreme Court. Further, he is a duly sworn
and authorized member of the Bar of this Court.

Steven L. Bolotin
STEVEN L. BOLOTIN
Assistant Public Defender
Attorney for Petitioner

STATE OF FLORIDA
COUNTY OF LEON

SWORN TO AND SUBSCRIBED to before me this 2nd day of
July, 1982, at Tallahassee, Leon County, Florida.

Gloria J. Thonum
NOTARY PUBLIC, State of Florida

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Feb. 24, 1983
Bundled This Year Fair - Insurance, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, and to Mr. Aubrey Dennis Adams, Jr., #067227, Post Office Box 747, Starke, Florida, 32091, this 2nd day of July, 1982.

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

AUBREY DENNIS ADAMS, JR.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

COUNSEL FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

AUBREY DENNIS ADAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

I, AUBREY DENNIS ADAMS, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

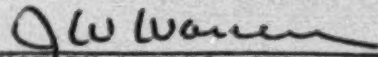
1. I am the petitioner in the above-entitled case.
2. Because of my poverty I am unable to pay the costs of said cause; I own no real personal property; I am incarcerated and receive no income from earnings.
3. I am unable to give security for said cause.
4. I believe that I am entitled to the redress I seek in said cause.


AUBREY DENNIS ADAMS

STATE OF FLORIDA

COUNTY OF Bradford

The foregoing affidavit of AUBREY DENNIS ADAMS was subscribed and sworn to before me this 3 day of June, 1982.


NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 4, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Aubrey Dennis Adams, Jr., #067227, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 2nd day of July, 1982.

Steven L Bolotin
STEVEN L. BOLOTIN

STATE OF FLORIDA

COUNTY OF Burlington

The foregoing Affidavit of Steven L. Bolotin was subscribed and sworn to before me this 3 day of July, 1982.

[Signature]
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES
[illegible]
AT [illegible]

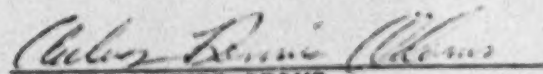
NO. **82 5020**

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

AUBREY DENNIS ADAMS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

I, AUBREY DENNIS ADAMS, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

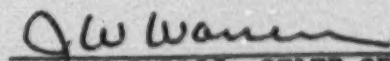
1. I am the petitioner in the above-entitled case.
2. Because of my poverty I am unable to pay the costs of said cause; I own no real personal property; I am incarcerated and receive no income from earnings.
3. I am unable to give security for said cause.
4. I believe that I am entitled to the redress I seek in said cause.


AUBREY DENNIS ADAMS

STATE OF FLORIDA

COUNTY OF Bradford

The foregoing affidavit of AUBREY DENNIS ADAMS was subscribed and sworn to before me this 3 day of June, 1982.


NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT 6, 1982

82 5020

CERTIFICATE OF SERVICE

JUL 7 1982

OFFICE OF THE CLERK
SUPREME COURT U.S.

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Aubrey Dennis Adams, Jr., #067227, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 2nd day of July, 1982.

Steven L. Bolotin
STEVEN L. BOLOTIN